

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**JAMES E. WAGONER, SR., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ANNISTON  
ARMY DEPOT, Anniston, AL, Employer**

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**Docket No. 04-634**

**Issued: June 17, 2004**

*Appearances:*

*James E. Wagoner, Sr., pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On January 9, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 2, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant is entitled to more than a 75 percent permanent impairment for loss of use of both lungs, for which he has received a schedule award.

**FACTUAL HISTORY**

On March 15, 1989 appellant, then a 53-year-old machine tool operator, filed an occupational disease claim alleging that he developed a pulmonary condition due to his workplace exposure to chemicals and asbestos. The Office accepted appellant's claim for aggravation of chronic bronchitis and chronic airway obstruction and expanded this to include right lung carcinoma, lung-related exposure to chemicals and asbestosis and authorized a right thoracotomy and lobectomy which was performed on January 10, 2001. Appellant worked

intermittently from June 30, 1993 to January 10, 2001. He sustained recurrences of disability on August 11, 1994, April 1, 1996, February 2, 1998, March 25, 1999 and January 10, 2001.<sup>1</sup>

On August 5, 1992 appellant filed a claim for a schedule award. In a decision dated November 1, 1993, the Office granted appellant a schedule award for 34 percent permanent loss of lung. The period of the schedule award was from August 25, 1993 to September 6, 1995.

On April 21, 2003 appellant filed a claim for a schedule award.<sup>2</sup>

In a letter dated June 4, 2003, the Office requested that Dr. Rohit G. Patel, a Board-certified internist and appellant's treating physician, submit an assessment of permanent impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>3</sup> (A.M.A., *Guides*).

In a report dated June 27, 2003, Dr. Patel advised that appellant's chronic obstructive pulmonary disease (COPD) was debilitating and that he required oxygen. He noted that the last pulmonary function test dated February 19, 2001 revealed a forced expiratory volume in the first second (FEV<sup>1</sup>) of 40 percent of predicted, which was suggestive of severe obstructive lung disease and would rate a Class 4 limitation. Also submitted was a report from Dr. Wilfredo Grana, a Board-certified internist, dated July 14, 2003, which diagnosed aggravation of chronic bronchitis with COPD, lung cancer, lobectomy, radiation of the right lung and anxiety.

On August 13, 2003 the Office referred appellant for a second opinion evaluation to Dr. Allan R. Goldstein, a Board-certified internist with a subspecialty in pulmonary disease. The Office provided Dr. Goldstein with appellant's medical records, a statement of accepted facts as well as a detailed description of his employment duties. In a medical report dated September 11, 2003, Dr. Goldstein indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted upon physical examination decreased breath sounds bilaterally with dullness to percussion on the right. The physician advised that the chest x-ray did not reveal any nodular or linear disease that would be consistent with pneumoconiosis but that appellant was impaired significantly with lung disease complicated by cancer of the lung. Dr. Goldstein further advised that the pulmonary function test performed on September 29, 2003 revealed a FEV<sup>1</sup> of less than 1.45, forced vital capacity (FVC) of less than 1.65 and a diffusing capacity for carbon dioxide (DLCO) of less than 10.5 millimeter (mm), per minute. He found that, in accordance with the A.M.A., *Guides*, this would be a Class 4, with a ratable pulmonary impairment of between 51 to 100 percent.<sup>4</sup> He concluded that appellant was totally and permanently disabled from lung disease.

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<sup>1</sup> Appellant has filed the additional claims for compensation: claim number A6-332068 and A6-456810 for hearing loss, claim number A6-407310 for a low back injury, claim number A6-413867 for foot injuries and claim number A6-423498 for multiple contusions. The instant claim was adjudicated under claim number A6-457452.

<sup>2</sup> Appellant also filed claims for schedule awards on June 26, 1996 and February 12, 2002. However, it appears from the record that the Office did not issue a decision with regard to these claims.

<sup>3</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>4</sup> See A.M.A., *Guides*, Table 5.10 at 107 (5<sup>th</sup> ed. 2001).

Dr. Goldstein's report and the case record were referred to an Office medical adviser who, in a report dated September 24, 2003, determined that, in accordance with the A.M.A., *Guides*, appellant had a 75 percent impairment of the whole person.<sup>5</sup> He noted that appellant reached maximum medical improvement on September 11, 2003. The Office medical adviser noted that the pulmonary function test of September 11, 2003 revealed an FVC of 1.61, which was 40 percent of predicted, an FEV<sup>1</sup> of 1.26 or 40 percent of predicted and DLCO of 9.9 or 38 percent of predicted. The medical adviser noted that, in accordance with the A.M.A., *Guides*, the above values were Class 4, with a ratable pulmonary impairment of between 51 to 100 percent.<sup>6</sup> He concluded that appellant had a 75 percent impairment of the whole person which was the mean of 51 percent and 100 percent impairment.

In a decision dated October 2, 2003, the Office granted appellant a 41 percent impairment of both lungs for the period of October 5, 2003 to March 18, 2006. The Office noted that the Office medical adviser found that appellant was entitled to a 75 percent impairment of the whole person, but that, as appellant had previously been awarded a 34 percent impairment of the whole person for the period of August 25, 1993 to September 6, 1995, he would be entitled to a 41 percent permanent impairment of the whole person for his lung impairment.

### **LEGAL PRECEDENT**

An employee seeking compensation under the Federal Employees' Compensation Act<sup>7</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>8</sup> including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.<sup>9</sup>

The schedule award provision of the Act<sup>10</sup> and its implementing regulation<sup>11</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

<sup>9</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>10</sup> 5 U.S.C. § 8107.

<sup>11</sup> 20 C.F.R. § 10.404 (1999).

With regard to respiratory or pulmonary impairments, the A.M.A., *Guides* provides a table consisting of four classes of respiratory impairment based on a comparison of observed values for certain ventilatory function measures and their respective predicted values.<sup>12</sup> For Classes 2 through 4, the appropriate class of impairment is determined by whether the observed values fall alternatively within identified standards for FVC, FEV<sup>1</sup>, DLCO<sup>13</sup> or maximum oxygen consumption (VO2Max). For each of the FVC, FEV<sup>1</sup> and DLCO results, an observed result will be placed within Class 2, 3 or 4, if it falls within a specified percentage of the predicted value for the observed person.<sup>14</sup> For VO2Max, an observed result will be placed within Class 2, 3 or 4 if it falls within a specified range of oxygen volume.<sup>15</sup> A person will fall within Class 1 and be deemed to have no impairment, if the FVC, FEV<sup>1</sup>, ratio of FEV<sup>1</sup> to FVC and DLCO are greater than or equal to the lower limit of normal, or the VO2Max is greater than or equal to a specified oxygen volume.

### ANALYSIS

In the instant case, the record shows that Dr. Goldstein, the Office referral physician, performed a complete and thorough examination of appellant in accordance with the Office's requirements for possible pulmonary disability and submitted a report which presents the necessary findings. In his report dated September 11, 2003, Dr. Goldstein advised that the pulmonary function test which was performed on September 29, 2003 revealed an FEV<sup>1</sup> of less than 1.45, an FVC of less than 1.65 and a DLCO of less than 10.5 mm per minute, which in accordance with the A.M.A., *Guides*, would be a Class 4 with a 51 percent to 100 percent impairment of the whole person.

The Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Dr. Goldstein's September 11, 2003 report and determined, using the A.M.A., *Guides*, that the results of the pulmonary function tests placed appellant in Class 4 of respiratory impairment and, therefore, determined that appellant had a ratable pulmonary impairment of between 51 percent and 100 percent. The physician noted that the pulmonary function test of September 11, 2003 revealed an FVC of 1.61 which was 40 percent of predicted, an FEV<sup>1</sup> of 1.26 or 40 percent of predicted and DLCO was 9.9 or 38 percent of predicted. The medical adviser advised that the above values were in Class 4, which was 51 percent to 100 percent impairment of the whole person, in accordance with the A.M.A., *Guides*.<sup>16</sup> He concluded that appellant had a 75 percent impairment of the whole person, which was the mean of 51 percent and 100 percent impairment.

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<sup>12</sup> *Supra* note 4.

<sup>13</sup> This is characterized in the A.M.A., *Guides* as the DLCO test.

<sup>14</sup> With respect to Class 2, the observed value must also be less than the lower limit of normal. The predicted normal values and the predicted lower limits of normal values for the FVC, FEV<sup>1</sup> and DLCO tests are delineated in separate tables. A.M.A., *Guides*, page 95-100, Tables 5-2a through 5-7b.

<sup>15</sup> The A.M.A., *Guides* provides alternate means for measuring such volumes.

<sup>16</sup> See A.M.A., *Guides*, page 107, Table 5.10 (5<sup>th</sup> ed. 2001).

The Board finds that the Office applied the proper standards to the findings of Dr. Goldstein's September 11, 2003 pulmonary function studies in determining that appellant's studies were within Class 4 for a 51 percent to 100 percent impairment of the whole person.

Table 5-12 of the A.M.A., *Guides* indicates that in finding a Class 4 impairment, the FVC should be less than 50 percent of predicted, the FEV<sup>1</sup> less than 40 percent of predicted and the DLCO less than 40 percent of predicted. As stated above, appellant's values for these tests were 40 percent, 40 percent and 38 percent of predicted respectively. The Office medical adviser, therefore, was generous in his determination that appellant was entitled to a 75 percent whole person impairment.

### **CONCLUSION**

The Board, therefore, finds that appellant has not established that he is entitled to more than 75 percent permanent impairment of both lungs for which he has received schedule awards.

### **ORDER**

**IT IS HEREBY ORDERED** that the October 2, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member